20-289

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~654.~~ 321

THE CITY OF MEMPHIS, APPELLANT,

vs.

TALLMADGE E. BROWN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED NOVEMBER 5, 1873.

Oct. D. 1874

SUPREME COURT OF THE UNITED STATES.

No. 634.

THE CITY OF MEMPHIS, APPELLANT,

vs.

TALLMADGE E. BROWN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

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1 Proceedings had in the circuit court of the United States for the sixth circuit and district of West Tennessee, in a cause hereinbelow entitled at an adjourned regular term of said court, to wit, its adjournment of the November term, A. D. 1872, begun and holden in the Federal court-rooms in No. 450 Main street, in the city of Memphis, and county of Shelby, in said district, before the honorable H. H. Emmons, United States circuit judge for said circuit, present and presiding.

THE CITY OF MEMPHIS *vs.* TALLMADGE E. BROWN. } 196. Inj't'n bill.

2 In the circuit court *court* of the United States for the district of West Tennessee. In equity.

CITY OF MEMPHIS *vs.* T. E. BROWN. } 196. Filed 1873, Feb'y 6.

To the judges, &c.:

The City of Memphis respectfully shows the court that, on the 1st day of April, 1872, a writ of execution commonly called a fieri facias, issued on the decree herein pronounced, on the 19th day of March, 1872, in favor of the said T. E. Brown, against The City of Memphis, returnable to the May term, 1872, of this court. Under the said writ of execution, as will more fully appear by reference to the return thereon, the marshal, to whose hands the said writ of execution came, levied upon certain real estate as the property of the City of Memphis, and upon certain personal property belonging to it, and also served garnishments upon certain persons alleged to be indebted to the City of Memphis. For more certainty and particularity to all the said matters, the City Memphis refers to the bill and the amendment thereto, filed herein on the 16th day of April, 1872, and the proceedings thereunder, now
3 remaining of record in the court to be hereinafter more particularly mentioned.

Amongst the property so levied upon as shown by the said return on the said writ of execution were one thousand shares of the capital stock of the Memphis Water Company, each share being for the nominal sum of one hundred dollars. After the said levy the marshal advertised that he would sell the said property, and on the 16th day of April, 1872, the City of Memphis filed its bill in this court against the said T. E. Brown, the same being No. 170 on the equity docket, and thereupon by the fiat of one of the judges of this court obtained an injunction enjoining and restraining the said T. E. Brown from further proceedings under or by virtue of the said execution, and especially from selling any of the property levied upon as aforesaid, and from otherwise in any way enforcing said execution, and from suing out any other writ of execution or fieri facias, and from any and all proceedings to enforce the said decree by fieri facias, until the further order of the court.

In obedience to said injunction, the said proceedings under the
4 said levy of the said execution were suspended and the marshal returned the said writ with a return thereon showing the said levy, and his proceedings thereunder, and the said levy, as will hereafter

more fully appear, has never been disposed of, but remains in full force and undisposed of.

At the May term, 1872, of this court the said injunction by the order of this court was continued, and at the special October adjourned term the said suit was finally heard upon the bill, answer, replication, and proofs, and the court, being of opinion that an original bill was not the proper method of obtaining the relief prayed by the City of Memphis, upon that ground alone and no other, dismissed the bill and adjudged the costs against the City of Memphis. And, afterwards, at the same term, the City of Memphis prayed and obtained an appeal from the said decree so dismissing its said bill to the Supreme Court of the United States where the same is now pending undetermined.

But immediately after the decree dismissing the bill of the City of Memphis, on the same day, by leave of the court, it filed its bill and the amendments thereto as a motion, and the proof it had taken in support of the same as affidavits in support thereof, and thereupon prayed
5 a perpetual stay of proceedings under the said levy of the said execution, and the said T. E. Brown, appeared and resisted the said motion, and by the leave of the court, relied upon his answers in the said cause and the proof on file in support of the same, as affidavits in opposition to the said motion; and the court, after hearing and considering the same, ordered, and decreed that the said proceedings be perpetually stayed.

And thereupon, at the same term, the said T. E. Brown prayed and obtained an appeal from the said order and decree so perpetually staying the said proceedings to the Supreme Court of the United States, where the same is now pending undetermined. The City of Memphis submits that the effect of the said proceedings is to leave the said levy of the said execution on the said real estate and personal property, & by garnishment a subsisting and undisposed of levy in full force.

But, notwthstanding the said facts, the clerk of the court on the 21st day of October, 1872, without any order of the court in that behalf, issued an alias writ of execution, similar in form to the first, on the said decree in favor of the said T. E. Brown against The City of
6 Memphis, and the same afterwards came to the hands of the marshal of the district of West Tennessee, and under the same, on the same day, he again levied upon the said one thousand shares of stock in the Memphis Water Company, so levied on under the first writ of execution, and made his return to the November term, 1872, of this court, as the said writ commanded him accordingly. Since the said return, on the 25th day of January, 1873, the marshal has published the following notice: that he will, on the 4th day of February, 1873, sell the said shares of stock, under the said levy, to the highest bidder for cash, and he no doubt will do so unless prevented by the order of the court.

The City of Memphis submits that, under the facts herein detailed, the issue of the said execution was unauthorized; or if the issue thereof was proper, then that the levy of the same upon the said shares of stock in the water company, which were then subject to a subsisting and undisposed of levy under the first writ of execution, and while the said levy of the said first execution on the said real estate, and the said other personal property, and by garnishment remained undisposed of as aforesaid, was without authority of law, and is void.

7 Among the powers conferred by its charter on *on* the City of Memphis is the power to supply itself and its inhabitants with water sufficient for public and private purposes.

By a decision of the supreme court of Tennessee, it was determined that the exclusive privilege of supplying the City of Memphis and its inhabitants with water by means of public works erected in pursuance of its charter, was in the Memphis Water Company for the period of thirty years from the grant of its charter.

The Memphis Water Company, without the aid and co-operation of the City of Memphis, was not able to erect water-works for the supply of the city and its inhabitants with water, and with a view of executing the power aforesaid of supplying water for public and private use, which was a corporate duty, and because the same could be performed in no other way, the City of Memphis, by a contract between itself and the water company, acquired a half interest in the Memphis Water Company, or the said one thousand shares of stock, which represent a half-interest, upon certain terms particularly set out in the said contract, which is here referred to as a part hereof for more certainty. The said interest in the water company, or the said shares of stock the
8 City of Memphis acquired and now holds for public purposes, and the same are necessary for the convenience and use of the public; and it is necessary to the proper execution of its said power to supply itself and its inhabitants with water that the city should retain the interest or stock it has in the water company. In acquiring the said interest or stock the city looked to the control and direction of the water company that the holding of the same would give it. Various offers were made by the water company and its stockholders that the city should take a less interest than one-half; but they were all declined, because the holding of a less interest than one half would not give the city, as the representative of the public, the control of the directory of the company, which the ownership of the half interest would give it. And the city under no circumstances would have made the contract above referred to, or have taken or subscribed for stock in the water company unless a half interest, and through it the direction and control of the company had been given it.

After the general council had passed the ordinance subscribing for the said shares of stock, the same, under the constitution and laws of the State, was submitted to the qualified voters of the city at an
9 election held for the purpose, and was approved or ratified by three-fourths of them, and thereupon the subscription was made and the certificates of stock were issued and delivered to the city.

The city submits that the acquisition of the said stock in the said manner, and particularly by the contract before referred, was a dedication by the water company and its stockholders, as well as by the city of the said shares of stock or interest in the water company to the public, and that the same is held solely and exclusively as public property, and for the use and convenience of the public, and that the city does not stand in the attitude of an ordinary share-holder owning so many shares of stock in the corporation.

The city states and shows that the public is greatly interested in fixing the price of water, the quality of it, and the amount of the supply, and in seeing that the pipes, aqueducts, and other appara'us of the water company ar' located and used for the advantage of the city and its citizens, and that it is exceedingly important, if not essential to the attainment of these ends that the city retain the said interest or shares of stock.

And the sale of the said shares of stock or interest as the city avers and believes, would effectually paralyze the efforts of its municipal
10 government to control the direction and operations of the water

company, or to carry into effect its power of supplying itself and its inhabitants with water.

The city also acquired the said interest or shares of stock with the design of ultimately becoming the sole owner of the franchises and property of the said water company as provided in the water company charter.

The city here refers to its own charter and the charter of the Memphis Water Company, and the ordinance of its counsel so ratified by the voters of the city, as parts hereof, and prays leave to rely upon the same, and upon the several records hereinbefore referred to on the hearing hereof.

And the City of Memphis here sets up and pleads the act of the legislature of the State of Tennessee, passed and approved July 8th, 1870, entitled "An act to exempt from execution and attachment the property of municipal corporations," which has been adopted by an act of Congress and a rule of this court, as the law of this court, as a protection against a sale of its interest or stock in the said water company, and submits that, independent of the said statute, the said interest or stock are not by law subject to levy and sale under the writ of execution in favor of the said T. E. Brown.

11 The city also states and shows that a sale of the said interest or stock under the said execution, even if invalid, and subject to be set aside, will lead to complications, and great public inconvenience.

In consideration of the premises the City of Memphis prays that this may be taken as its bill; that the said T. E. Brown, who is a citizen of the State of Iowa, but who is before the court, and whose attorney, S. Sibley, esq., is within its jurisdiction, be made a defendant, and be brought in by proper process, or required without process, to answer the allegations herein contained; that an injunction may issue restraining the sale of the said shares of stock or interest in the water company, until the further order of this court; that, on the final hearing, the said injunction may be made perpetual, and the said shares of stock or interest in the water company be decreed not subject to levy or sale under execution at law, and that the city may have all other proper relief. And as in duty, &c.

W. M. RANDOLPH,
City Attorney.

I, John Johnson, mayor of the city of Memphis, do state on
12 oath, that I have carefully read the foregoing motion or petition of the City of Memphis, and that the statements therein made are true to the best of my knowledge, information, and belief.

JOHN JOHNSON, *Mayor.*

Subscribed and sworn to this the 25th day of January, 1873.

JOHN P. FISCHER,
Notary Public.

[L. S. OF CITY.] Attest:
L. R. RICHARDS,
City Register.

Notice of sale.

United States marshal's sale of stock in the Memphis Water Company.

T. E. BROWN
v. } 147.
CITY OF MEMPHIS.

By virtue of an execution to me directed from the circuit court of the

United States for the sixth circuit and district of West Tennessee, commanding me to make from the goods, chattels, &c., of the City of Memphis, the sum of $488,993.00, I will, on Tuesday, the 4th day of February, A. D. 1873, at the door of the United States court-room, No. 450, Main street, in the city of Memphis, Tennessee, at 10 o'clock a. m. of that day, sell to the highest bidder for cash the stock belonging to the City of
13 Memphis, in the Memphis Water Company, it being one thousand shares of one hundred dollars each; the said stock having been levied on by me to satisfy the execution aforesaid in the cause aforesaid.

L. B. EATON,
U. S. Marshal.
By S. I. ATLEE,
Deputy.

Cost bond.

Know all men by these presents that The City of Memphis and William M. Randolph, held and firmly bound unto T. E. Brown in the sum of two hundred and fifty dollars, to be void on condition that said city do pay and satisfy all costs that may accrue in that behalf in the prosecution of a suit this day commenced by it in the circuit court of the United States for the district of West Tennessee, at Memphis, against said T. E. Brown, on failure of the plaintiff to prosecute its said suit with effect; and also on failure of the defendant, if convicted, to pay said costs; and we agree that judgment on motion, without notice, may be rendered against us for the same.

Witness our hands and seals this 7th day of February 1873.

THE CITY OF MEMPHIS, [SEAL.]
By W'M M. RANDOLPH, *Att'y.*
W. M. RANDOLPH, *Surety.* [SEAL.]

14 EXHIBIT TO BILL.

Charter, judgment, contract and mortgage of the Memphis Water Co.

Memphis, Franklin job printing house and book bindery, 1872.

15 *President.*—John Cubbins.
Secretary and treasurer.—Charles J. Phillips.
Solicitor.—Oliver P. Lyles.
Board of directors.—John Cubbins, J. H. Humphreys, John S. Toof, J. E. Randle, B. C. Brown.

16 An act to incorporate the Memphis Water Company.

SECTION 1. *Be it enacted by the general assembly of the State of Tennessee,* That Thomas W. Brown, John S. Toof, John Gunn, and Benjamin C. Brown, and such other persons who may associate themselves with them, be, and they are hereby, constituted a body corporate under the name and style of the "Memphis Water Company," and by that name shall have succession for ninety-nine years, and shall have power to contract and be contracted with; to sue and be sued; to have and use a common seal; to borrow money upon their bonds, or other obligations, for such amounts and upon such conditions as to time and place of payment, and rates of interest, as may be agreed upon between the contracting parties;

to purchase and hold such real estate and personalty as may be necessary for the exercise and enjoyment of the powers and privileges by this act conferred upon said company; to elect all necessary officers; to make and establish by-laws and privileges incident to corporations.

SEC. 2. *Be it further enacted*, That the capital stock of said company shall be one hundred thousand dollars, which sum, when necessary, may be increased to two million dollars by vote of the stockholders. Said stock shall be divided into shares of one hundred dollars each, and each share upon which all legal calls have been paid, shall entitle its holder to one vote in all elections of the company: *Provided*, That, except at the first election, no share of stock shall entitle its holder to a vote, unless he shall have held the same in his own right at least sixty days previous to said election. Stock shall only be assigned upon the books of the company.

17 SEC. 3. *Be it further enacted*, That the management of the affairs of said company shall be vested in five directors who shall be elected at a general meeting of the stockholders annually. Said directors shall elect one of their number to be president of said company. They may also appoint a secretary and treasurer for said company, and may take from such officer a bond, in such sum as they may deem sufficient, conditioned for the proper performance of his duties, and for correctly accounting for all monies which may come into his hands. All officers elected shall hold their offices until their successors are elected and qualified.

SEC. 4. *Be it further enacted*, That said company shall be, and it is hereby, authorized to establish and construct water-works in and adjacent to the city of Memphis, in this State, and to supply the said city and the inhabitants thereof with a plentiful supply of water; and for this purpose they are hereby authorized and empowered and invested with the exclusive privilege to lay down pipes and to extend aqueducts and conductors through all or any of the streets, lanes, and alleys of the city of Memphis, and supply to the inhabitants of said city, water by public works. And for the purpose of laying down such pipes, aqueducts, and conductors, may take up the pavements or side-walks upon such streets: *Provided*, That said pavements and side-walks shall be taken up in such manner as to give the least inconvenience to the inhabitants of said city, and that the same shall be replaced with all convenient speed by and at the expense of said company. The privilege hereby granted to be exclusive for thirty years, only; after which it is not to be exclusive.

SEC. 5. *Be it further enacted*, That the works and operations of said company shall be so constructed and managed as not to affect the health or comfort of the citizens of Memphis prejudicially; and nothing in this act shall be so construed as to absolve the company from any legal proceedings to restrain or abate any nuisance arising from their operations.

SEC. 6. *Be it further enacted*, That if any person shall injure or destroy any portion of the works, fixtures, or other property of the company, such person or persons shall be liable to the company for all damages sustained by them in consequence of such act or proceedings, and
18 in addition thereto shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than one hundred or more than one thousand dollars.

SEC. 7. *Be it further enacted*, That said company shall be, and they are hereby, empowered and authorized to condemn and take such lands as may be necessary for the establishment of their reservoirs and works;

and the right of way through all lands between their reservoirs and the said city of Memphis, to lay their pipes, aqueducts, or conductors, and to keep the same in repair, is hereby granted them: *Provided*, That such pipes and conductors shall be laid in such manner as to do as little injury to the property of private persons as possible: *And provided further*, That the company shall make compensation to the owner of the real estate so condemned and taken, or through which the pipes, conductors or aqueducts may be laid. If the owner and company cannot agree upon the amount of compensation which should be paid, the same shall be assessed in the manner provided by the Code of Tennessee, sections 1325 to 1348.

SEC. 8. *Be it further enacted*, That the stock of the company shall be paid up on such calls as the president and directors may prescribe. Any stockholder who shall fail to pay any calls made by the directors, shall forfeit his stock and all payment made thereon, or the president and directors may recover the amount of such calls by suit. The company shall have no power to release stockholders from payment of their stock to the prejudice of creditors. Said company may organize whenever the sum of fifty thousand dollars is subscribed.

SEC. 9. *Be it further enacted*, That, to secure payment of bonds issued, or monies borrowed, the president and directors may mortgage all the property of the company existing at the date of the mortgage, as well as all the property by the company to be afterwards acquired, and the franchises granted by this act. And in case of foreclosure and sale of such mortgage, the purchaser or purchasers shall succeed to, and be vested with all the *the* powers and privileges, and be subject to all the duties and liabilities of said company.

SEC. 10. *Be it further enacted*, That said company shall furnish
19 water to the city of Memphis sufficient to supply the public offices, police stations, hospitals and engine-houses, and for extinguishing fires, free of charge. But this section shall not be so construed as to authorize said city to use the water supplied by said company for cleaning or sprinkling the streets, or for any other such purpose, without paying therefor. Said company shall also furnish, free of charge, whenever required by the city, water sufficient to supply a fountain (to be erected by the city) in Court square, and another in Market square.

SEC. 11. *Be it further enacted*, That, at any time after twenty years after passage of this act, the city of Memphis, should the authorities thereof desire to do so, shall have the right to purchase the works, pipes, and other property of the company, upon such terms as to price and mode of payment as may be agreed upon. Should the parties be unable to agree upon a price, such works shall be valued by five disinterested persons, two to be appointed by each party, and the fifth to be selected by the four thus appointed, and upon payment to the company of the valuation so assessed, the right to all such property and to the privileges granted by this act shall vest in said city.

SEC. 12. *Be it further enacted*, That all acts in conflict with this act be, and the same are hereby, repealed, and that this act take effect and be in force from and after its passage.

Passed February 28, 1870.

W. O. N. PERKINS,
Speaker of the House of Representatives.
D. W. THOMAS,
Speaker of the Senate.

I, Andrew J. Fletcher, secretary of state of the state of Tennessee,

do certify that the foregoing is a copy of an act of the general assembly of the State of Tennessee, the original of which is now of record in my office.

In testimony whereof, I have hereunto subscribed my official signature, and by order of the governor affixed the great seal of the State of Tennessee, at the department, in the city of Nashville, this 3d day of March, A. D. 1870.

[SEAL.] A. J. FLETCHER,
Secretary of State.

20 THE STATE OF TENNESSEE:

Pleas before the supreme court of said State, for the western division thereof, at Jackson, on the first Monday in April, 1871, present, the honorable A. O. P. Nicholsen, chief justice; and James W. Deadrick, Thomas J. Freeman, John L. T. Sneed, Thomas A. R. Nelson, and Peter Turney, associate judges, to wit: June the 28th, 1871.

Opinion.

No. 185, First circuit court, Shelby County.

THE CITY OF MEMPHIS
vs.
THE MEMPHIS WATER COMPANY.

The facts in this case agreed upon by the parties, and necessary to be noticed in determining the question raised, are as follows:

The City of Memphis has been for many years a municipal corporation, regularly chartered and organized.

On the 18th day of December, 1866, the mayor and aldermen passed an ordinance to create a board of commissioners for the erection, care and maintenance of the Memphis water-works.

The commissioners were appointed and organized, and entered on the discharge of their duties, and made reports from time to time to the mayor and aldermen, the last of which was made in April, 1869, when a plan of constructing water-works was reported and adopted by the board of mayor and aldermen.

The commissioners caused surveys, maps, drawings, measurements, and estimates to be made, preparatory to commencing the actual construction of the water-works. In these preparatory steps the City of Memphis expended $30,000, prior to the 28th of February, 1870, at which time the city had not commenced the actual construction of water-works. No contracts, as contemplated by reports of the
21 commissioners were made or entered into, and no advertisement for proposals had been made as contemplated by said reports.

The want of available means by the city, and the financial distress and disturbed condition of the country, were the causes of the non-prosecution of the building of water-works by the city.

On the 28th of February, 1870, the legislature granted a charter of incorporation to the Memphis Water Company, for the purpose of supplying water to the city of Memphis and the inhabitants thereof, by means of public works.

The water company, claiming the right to do so under its charter, immediately on its organization expended sums of money in and about the construction of its water-works in the city of Memphis, and proceeded to take up the pavements and sidewalks, and to use the streets,

lanes and alleys of the city for the purpose of laying down its pipes, aqueducts, and conductors, and constructing its water-works under its charter, without the consent, and in opposition to the will of the general council of the City of Memphis, and without making compensation therefor to the city or to the adjacent property-holders.

After the water company entered upon the construction of its water-works under its charter, the City of Memphis commenced to erect water-works for the purpose of supplying the city and its inhabitants with water, and proceeded to erect the same on its own account in violation of the provisions of the charter of the water company, which declares that the privileges granted it are exclusive for the period of thirty years, claiming that the city has a right to do so under the city charter, which the water company on its part denies, and insists that the action of the city is an invasion of its rights under its charter.

These are the material facts agreed on, and submitted to the court below for adjudication.

The court below decided the case against the City of Memphis, and she appeals to this court.

We have devoted as much time to the investigation of the important legal questions involved in this case, as was practicable in view of the heavy pressure of business now upon us. Our labor has been so materially aided and lessened by the elaborate and exhaustive printed arguments on both sides, that we are enabled to announce
22 the results to which we have arrived; but have not the time, however, to discuss the several questions so ably and ingeniously argued, and must be content to state only the several propositions of law which are decisive of the case.

1st. The City of Memphis is a municipal or public corporation, as contra-distinguished from a private corporation.

Municipal or public grants of franchises are always subject to the control of the legislative power, for the purpose of amendment, modification, or entire revocation. (5 Hum., 241; 3 Head., 319; Cooly's Const. Lim., 192.)

2d. The erection of water-works to supply a city and its inhabitants with water, falls naturally and legitimately within the ordinary powers of its charter of incorporation, and the exercise of this power within the limits chartered needs no enabling act of the legislature.

It is, therefore, one of the powers of the corporation, subject to amendment, modification, limitation, or revocation by the legislature. To what extent, if at all, the legislature can interfere with interests acquired or vested in the due exercise of its corporative powers, by a public corporation, presents a question not now necessary to be examined or determined. (9 Hum., 268; 11 Hum., 582.)

3d. The repeal, revocation, or modification of the powers of a municipal corporation, may be effected either expressly or by necessary implication, by subsequent legislation. Hence, if the act of 28th of February, 1870, incorporating the Memphis Water Company with exclusive powers to erect water-works in Memphis, and supply the city and its inhabitants with water, was a valid and constitutional exercise of legislative power, it operated, by necessary implication, as a revocation of the power of the city corporation to erect water-works for the same purposes.

4th. The Memphis Water Company is a private corporation, and upon the acceptance of its charter by the corporators and their organization under it, a contract was thereby consummated between the State and the corporators which was beyond the reach of subsequent legislative

interference. It is conceded that by its express terms the privilege granted to the Memphis Water Company for thirty years is exclusive

What provisions of the constitution forbid the granting of a
23 charter with an exclusive privilege? The legislature has the right to do whatever is not expressly, or by necessary implication, forbidden by the Constitution. (8 Hum., 1; Cooly's Const. Lim., 87, 168, 173.)

5th. By sec. 22, article 1, constitution of 1834, perpetuities and monopolies are cont'ary to the genius of a free State, and shall not be allowed.

The charter of the Memphis Water Company limits the duration of the corporation to ninety-nine years, with exclusive privilege for thirty years. It does not therefore create a perpetuity. Does it create a monopoly by securing to the company the exclusive privilege of supplying the city with water by means of water-works?

We know of no better definition of a monopoly than that given by Lord Coke, and adopted by the Supreme Court in the case of the Charles River Bridge vs. Warren Bridge, 11 Peters, 607:

"A monopoly is an exclusive right granted to a few of something which was before of common right; so that it is not a case of monopoly if the subject had not the common right or liberty before to do the act, or possess or enjoy the privilege or franchise granted, as a common right."

The question then is narrowed down to the inquiry: Did the individuals composing the Memphis Water Company have the right, before their incorporation, in common with all others, to erect water-works in Memphis, to take up pavements, occupy the streets, and do such things as were necessary and proper in completing their water works? It is clear that none had the right to do these things, except the City of Memphis, by virtue of its corporate powers; and this right, on the part of the city, was exclusive until it was taken away by the legislature and transferred to the Memphis Water Company. It is no more a monopoly when conferred on the water company than when it belonged to the city of Memphis. It was an exclusive privilege when exercised by the City, but it was not a monopoly. It is an exclusive privilege in the Memphis Water Company, but not a monopoly. (Black, 4 book, p. 159; 31 Mayl. R., 346.)

6th. Is the exclusive privilege granted by its charter to the Memphis Water Company forbidden by sec. 7, art. 11 of the constitution?

It would be difficult to show that the privileges secured to the
24 water company are not embraced within the prohibitions of this section, but it is even more clear that the power to grant an act of incorporation is forbidden by the language of the body of this section. The proviso to this section, however, gives the power to grant charters of incorporation, and for the purpose of enabling the legislature thereby to grant exclusive privilege, which, but for the proviso, would be prohibited by the body of the section. In this grant of power to create corporations, there is no limitation on its powers, at least as contained by the general terms of the section. The legislature is required to consult "the public good" in granting charters. (1 Sneed, 115; 4 Col., 414; Cooly's Const. Lim., 281.)

7th. The streets, alleys and pavements of the City of Memphis had been dedicated to the public as easements, and placed by the charter of the city under the control and management of the city authorities. If the city had gone on to erect water-works, and supply the inhabitants with water by means of pipes and aqueducts, and conductors,

they would have had the right to use the streets, pavements, and alleys, for the purpose of supplying the water, and no owner of abutting lots could have objected because no compensation was paid.

It would have been such appropriation of the easements, for the benefit of the inhabitants, as was authorized and contemplated by the muncipal corporation.

The legal effect of the act incorporating the Memphis Water Company, was to revoke this power as to the city corporation and to vest it in the water company. The easements are alike subject to appropriation for the purposes of the privilege, without compensation, whether the privilege be exercised by the city or by the water company. Angel on Highw., 25, 312; 9 Hum. 268.

Our conclusion is, that upon the facts agreed, the Memphis Water Company has the exclusive privilege of supplying the city of Memphis and its inhabitants with water, by means of the water-works erected in pursuance of their charter.

Such was the judgment of the court below, and we affirm it.

NICHOLSON.

25 *Judgment.*

THE CITY OF MEMPHIS, PLAINTIFF IN ERROR,
vs.
THE MEMPHIS WATER COMPANY, DEFENDANT in error.

This cause coming on to be heard before the honorable judges of the supreme court of Tennessee, on the duly certified transcript of the record of the proceedings and judgment in the court below, to wit: the first circuit court of Shelby County; and this court being sufficiently advised, it is considered that there is no error in the judgment of the said first circuit court, in the aforesaid premises, and the said judgment is therefore affirmed. It is therefore considered, and so adjudged and decreed that the City of Memphis is not entitled to the relief, nor to any part thereof, sought by the said plaintiff in error, and on its behalf; and that the charter of the defendants, the Memphis Water Company, is not in whole nor in part, nor in any provision thereof, in conflict with any constitutional provision; that the said Memphis Water Company have the right to the undisturbed enjoyments of all the rights, privileges, and franchises granted the said company by its charter, which is an act of the general assembly of the State of Tennessee, passed February 28, 1870, and entitled "An act to incorporate the Memphis Water Company."

The said Memphis Water Company is hereby confirmed in all the said rights, privileges, and franchises conferred by the aforesaid act, incorporating the same without any abridgement or modification thereof; and it is ordered and decreed that the said company be quieted, and remain unmolested in the use, exercise, and enjoyment of the same, free from all interruption or interference by or on behalf of the City of Memphis. And it is further ordered, adjudged, and decreed that the City of Memphis and its corporate authorities, now and in the future be enjoined, and they are hereby enjoined and restrained from asserting, claiming, or exercising, for the period of thirty years, without the consent of defendants, the Memphis Water Company, the right, privilege, franchise, or business of supplying the city of Memphis and the inhabitants thereof, or either, with water by means of public works, it being

the exclusive privilege of defendants' corporation aforesaid so to do for the aforesaid period of thirty years.

26 The court being likewise of opinion, and so deciding, that the defendants, the Memphis Water Company, is "authorized to establish and construct water-works in and adjacent to the city of Memphis, and to supply the said city and the inhabitants thereof with a plentiful supply of water," and for that purpose "that it is authorized, empowered, and invested with the exclusive privilege to lay down pipes and to extend acqueducts and conductors through all or any of the streets, lanes, and alleys of the City of Memphis, and to supply the inhabitants of the said city with water by public works," and "for the purpose of laying down such pipes, aqueducts, and conductors, may take up the pavements or sidewalks upon such streets, lanes, and alleys—the said pavements and sidewalks to be taken up in such manner as to give the least inconvenience to the inhabitants of said city, and the same to be replaced with all convenient speed by and at the expense of the said water company, and without the consent of the said City of Memphis or the inhabitants thereof, and without compensation to the said city, its inhabitants, or the adjacent property-holders or lot-owners.

It is therefore ordered, adjudged, and decreed, that the City of Memphis and its corporate authorities, now and in the future, be enjoined, during the ninety-nine years for which said charter has been granted the defendants, the Memphis Water Company, from interfering with, interrupting, or resisting the establishment and construction by the defendants, the Memphis Water Company, of water-works in and adjacent to the City of Memphis in the manner prescribed in the charter of the said Memphis Water Company; and also from interfering with, interrupting, or resisting the defendants, the Memphis Water Company, in the exercise of the exclusive privilege to lay down pipes, aqueducts, and conductors, through all or any of the streets, lanes, or alleys of the City of Memphis, for the purpose of supplying the said City of Memphis and the inhabitants thereof with water by means of public works, as provided for and contemplated in the charter of said defendants; and also from interfering with, interrupting, or resisting the defendants, the said Memphis Water Company, in taking up the pavements or sidewalks in such streets, lanes, or alleys, for the purpose of laying down such pipes, aqueducts, and conductors, the same to be taken up and replaced as prescribed in the defendants' charter.

27 And the City of Memphis and the corporate authorities thereof, are enjoined and restrained in like manner from interfering with, interrupting, or resisting the defendants, the Memphis Water Company, in the exercise of such incidental powers with reference to the use and occupation of said streets, lanes, and alleys, for the purposes, and in the mode hereinbefore declared, as may be necessary and proper to the carrying out of the privileges, franchises, and rights expressly granted in the said charter to the said defendants.

It is further adjudged that the defendants, the Memphis Water Company, recover of the City of Memphis, and of William M. Randolph, its surety in the appeal bond, all the costs of this cause in the court below, for which let execution issue.

OFFICE OF THE CLERK OF SUPREME COURT,
FOR THE WESTERN DIVISION OF THE STATE OF TENNESSEE.

I, John H. Freeman, clerk of said court, do hereby certify that the foregoing is a true, perfect, and complete copy of the opinion, as well as

the judgment of said court, pronounced at its April term, 1871, in the case of The City of Memphis against The Memphis Water Company, as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the court, at office in Jackson, on this the 29th day of June, 1871, and the Independence of the United States the 95th year.

[SEAL.] JOHN H. FREEMAN, *Clerk.*

28 *Contract.*

This agreement, made this the eighteenth day of January, A. D. 1872, by and between the City of Memphis and the Memphis Water Company, witnesseth:

Whereas, the Memphis Water Company has, by a vote of its stockholders, increased its capital-stock to, and has fixed the same at, the sum of two hundred thousand dollars; and, whereas, in accordance with the provisions of an ordinance passed on the eleventh day of December, 1871, and ratified by three-fourths of the qualified voters of the city of Memphis, at an election held for the purpose, on the sixth day of January, 1872; and also, in accordance with the terms of the report of the joint committee to which was referred the proposition of the Memphis Water Company, adopted by the general council of the City of Memphis, on the eleventh day of December, 1871, to which said ordinance and report, remaining of record in the office of the register of the city of Memphis, reference is now here made, the City of Memphis, by John Johnson, its mayor, has subscribed for one thousand shares, aggregating one hundred thousand dollars, and being one-half of the capital-stock of the Memphis Water Company, and the Memphis Water Company has issued and delivered to the City of Memphis a certificate showing that the said one thousand shares of stock have been fully paid for:

1. Now, in consideration of the premises, and, in accordance with the said ordinance, and the terms of the said report, the City of Memphis hereby undertakes and agrees to rent from the Memphis Water Company not less than twelve (12) fire-hydrants, on an average, for each mile of mains, or main-pipes that may be laid down within the limits of the city, and as many more than twelve, on an average, for each mile of mains or main pipes as the City of Memphis, by its general council, may require.

2. But the City of Memphis does not rent, nor agree to rent, fire-hydrants on parallel mains laid closer to each other than one square, or three hundred and eighty feet, unless the city, by its general council, directs them to be laid closer.

3. And where the city rents hydrants on parallel mains it does not agree to rent hydrants located on the mains laid across the
29 space between such parallel mains, unless the width of the space between the parallel mains on which the hydrants rented are located, equals or exceeds two squares or seven hundred and sixty feet. And, in this latter case, the City of Memphis does not agree to rent any hydrant placed nearer to the parallel mains on which the hydrants the city rents are located, than one square or three hundred and eighty feet.

4. And the City of Memphis, by its general council, shall have the right to designate the particular places at which the hydrants the city agrees to rent shall be located; but the places for the erection of hydrants shall be designated by the city at such times and in such manner as not to impede or interfere with the laying by the water company of its pipes.

5. And the City of Memphis does not agree to rent more than two (2) hydrants on any main of a less diameter than five (5) inches.

6. The water company agrees to furnish all fire-hydrants, valves, and connections, and place them in position ready for use, and keep the same in good repair and working order; and shall also make connections with the public cisterns as rapidly as possible, and supply them with water free of charge; but the city shall keep the public cisterns in good repair.

7. The water company hereby guarantees that the hydrants shall throw twelve (12) streams, each stream to be from a one-inch nozzle, and through fifty (50) feet of hose, one hundred feet high; or eight (8) streams, each from an inch and a quarter nozzle, through fifty (50) feet of hose, one hundred and twenty-five (125) feet high; or from four (4) streams, each from an inch and a half nozzle, through fifty (50) feet of hose, one hundred and fifty (150) feet high.

8. The City of Memphis agrees to rent the said fire-hydrants as aforesaid, for the term of twenty (20) years from this date; and the city hereby agrees to pay the water company an annual rent on each hydrant that it has agreed to rent, of one hundred and twenty-five dollars upon each one of the first one hundred (100) hydrants erected, and one hundred and twelve dollars and fifty cents ($112.50) upon each one of the second hundred (100) hydrants erected; and one hundred dollars ($100.00) upon each one of the third one hundred (100) hydrants erected; and seventy-five dollars ($75.00) upon each hydrant erected over and above three hundred (300.)

9. The rent shall be paid to the water company semi-annually, at the end of each six (6) months, in money; and the renting shall not commence until the machinery has been accepted by the water company as in good working order, nor until the water company has established, by a practical test, that it is able to throw the several streams of water to the several heights hereinbefore specified.

10. And if at any time the water company shall be unable, for a longer period than fifteen (15) days, to throw the several streams of water to the heights above specified, then and in every such case, the rent of the hydrants for such period or periods shall cease, and a rateable deduction shall be made from the several prices hereinbefore agreed to be paid, proportioned to the period of the inability.

11. Should the city purchase the water-works to be erected by the water company within the said period of twenty (20) years, then this contract is, from the date of such purchase, to cease, and be of no further effect.

12. Nothing in this contract is to be construed to exempt or discharge the water company from any duty or obligation to the City of Memphis, imposed upon it by its charter, but every such duty and obligation is to be performed and observed as if this contract had not been made.

Executed in duplicate this the 18th day of January, 1872.

Witness the signature of the mayor, and the seal of the City of Memphis, and the signature of the president, and the seal of the Memphis Water Company, at the City of Memphis, at the above date.

{ SEAL OF THE CITY OF MEMPHIS. } JOHN JOHNSON, *Mayor.*

Attest:

L. R. RICHARDS, *City Register.*

{ SEAL OF WATER COMP'Y. } JOHN CUBBINS, *President Memphis Water Company.*

Attest:

CHA'S J. PHILLIPS, *Sec'y and Treasurer.*

31 STATE OF TENNESSEE,
Shelby County:

Personally appeared before me, James Reilly, clerk of county court of said county, John Johnson, mayor, and John Cubbins, president of Memphis Water Company, the bargainers to the foregoing and hereto attached contract, with whom I am personally acquainted, and who acknowledge that they executed the same for the purpose therein contained.

Witness my hand, at office, this 26th day of January, A. D. 1872.

[SEAL.] JAMES REILLY, *Clerk.*
By H. B. CULLEN, *D. C.*

32 THE MEMPHIS WATER COMPANY
to
F. S. DAVIS, T. R. FARNSWORTH, AND JAMES L. WORTH. } Deed.

This indenture, made and entered into this 25th day of January, one thousand eight hundred and seventy-two, between The Memphis Water Company, a corporation duly chartered, organized, and doing business within the State and under the laws of Tennessee, party of the first part, and F. S. Davis and T. R. Farnsworth, of the city of Memphis, in the State of Tennessee, and James L. Worth, of the city of New York, in the State of New York, parties of the second part, witnesseth:

That for and in consideration of the sum of five dollars, paid by the parties of the second part, the receipt of which is hereby acknowledged, and for other considerations hereinafter appearing, the said party of the first part has this day bargained and sold, and by these presents does grant, bargain, sell, and convey unto the said parties of the second part, all the franchises, rights, and privileges granted to the said party of the first part, by the act of the legislature of the State of Tennessee, passed February 28th, 1870, incorporating said company, together with all the lands, houses, wells, pumps, machinery, pipes, and other property of said party of the first part, real and personal, now in possession of, and all which may hereafter be acquired by, said party of the first part, and also all the income which said party of the first part
33 may hereafter receive, acquire, or become entitled to, including all sums of money which the party of the first part may become entitled to receive from the City of Memphis, under and by virtue of a contract made and entered into between the said City of Memphis and the said party of the first part hereto, on the 18th day of January, A. D. 1872.

And the said party of the first part does hereby covenant unto and with said parties of the second part, that it is lawfully seized of said charter, privileges, and franchises, and has good right to sell and convey the same. And further, that it has good right to sell and convey all the property and income to be by it hereafter acquired, and that none of the franchises, property, or income hereby conveyed, is in anywise encumbered.

But this deed is made for the purposes and upon the trusts following and none other, that is to say:

Whereas the said party of the first part, in order to raise money to be used in the construction of its works, in laying pipes, and in doing the other works necessary to put their water-works into full operation have resolved, at a meeting of the directors held on the 25th day of

January, 1872, to issue the bonds of the company to an amount not exceeding six hundred thousand dollars, which said bonds are to be numbered from No. 1 to 600, inclusive; are to be for the sum of one thousand dollars each; to bear date the first day of March, 1872, and to be payable on the first day of March, 1892, in gold at par, to bearer, with interest at the rate of seven per cent. per annum, payable in gold at par, free of United States Government tax, at the National Park Bank, of New York, in New York City, in the State of New York, semi-annually, on the first days of March and September of each and every year; the first instalment being payable on the first day of September, A. D. 1872, for which interest-coupons shall be attached; such bonds to be signed by the president and countersigned by the secretary of said company, and to be identified as the bonds secured by this deed, by a certificate thereon to that effect, signed by the parties of the second part hereto, and each of them. And the party of the first part being desirous to secure to the holders of said bonds, who may purchase the same, or advance money thereon, or hold the same for any lawful purposes, the prompt and certain payment of the interest on said
34 bonds as it may fall due, according to the coupon thereto attached, and also, the prompt and certain payment of the principal of said bonds when the same shall become due and payable:

Now to effect these objects this indenture is made, and the following agreements and stipulations are entered into:

First. It is expressly understood and agreed, that if the party of the first part shall promptly pay the interest on said bonds, at the times and places agreed on in the coupons aforesaid, and the principal on said bonds when they become due and payable, then this indenture is to become null and void, and the title hereinbefore conveyed is to revert and revest in the party of the first part, without any reconveyance whatsoever.

Second. Until default in payment of interest or principal of said bonds, the party of the first part is to have the full possession and control of all the franchises, privileges, property and income hereby conveyed.

Third. Should the party of the first part make default in the payment of any instalment of interest on said bonds when the same becomes due and payable, or of any part thereof, then the said trustees, or any two of them, may at once take possession of the office, books, and other property of the party of the first part, and shall collect and receive all moneys due or payable to said party of the first part, including all sums due or coming due to the party of the first part, from the said City of Memphis, under the contract aforesaid, and shall apply the sums so received to the payment of any unpaid due interest-coupons until all such are paid, rendering any overplus by them received to the parties of the first part, and surrendering possession of such office, books, and property to the party of the first part, so soon as, through such receipts or otherwise, all unpaid due interest-coupons shall be fully paid and satisfied.

Fourth. Should the said party of the first part make default in the payment of more than two consecutive instalments of interest, then the whole of the principal hereby secured, to wit, the said bonds, together with the interest thereon accrued shall become and be due and payable, and at the request of a majority in interest of the bond-holders, the parties of the second part shall take immediate posses-
35 sion of all the franchises, rights, privileges, and property hereby conveyed, and after the notice and publication of the same, in the manner and way hereinafter provided in the fifth clause or sub-

division of this instrument, at the time and place mentioned in said notice, sell all the franchises, rights, privileges, and property hereby conveyed, to the highest bidder, for cash in hand, and convey and deliver the same to the purchaser, and the proceeds, after paying expenses of this trust, they shall apply to the payment of said bonds and of all interest thereon, rendering the surplus, if any, to the party of the first part, or its assigns.

Fifth. Should the said party of the first part make default in the payment of the principal of said bonds at maturity, or of any part thereof, the parties of the second part may, on being required so to do, by the holder or holders of any of said bonds, take immediate possession of all the franchises, rights, privileges, and property hereby conveyed; and, first giving notice of the time, place, and terms of sale, by advertisement printed in two newspapers published in the city of Memphis, and two published in the city of New York, for sixty days daily before the day of sale, at the time and place mentioned in said notice, sell all the franchises, rights, privileges, and property herein conveyed, to the highest bidder, for cash in hand, and may convey and deliver the same to the purchaser; and the proceeds, after paying expenses of this trust, they shall apply to the payment of said bonds and of all interest thereon, rendering the surplus, if any, to the party of the first part or its assigns.

Sixth. In the event of the death, mental incapacity, removal, or resignation of either of the parties of the second part, the one or two remaining, as the case may be, shall have and exercise all the rights, powers. and duties hereinbefore conferred upon the three.

And in the event of the death, mental incapacity, removal, or resignation of all of the parties of the second part, then a majority in number and value of said bondholders, may, by any writing under their hands, appoint one or more persons trustees hereof, who shall thereupon become vested with all the rights, and be entitled to exercise all the powers confered upon the parties of the second part by this indenture.

And in the event of a sale under this indenture the party of the
36 first part waives all equity of redemption, which it may have by the laws of Tennessee, and also waives the necessity ot the parties of the second part giving bond and security for performance of this trust.

(SEAL OF WATER COM'Y.) In testimony whereof, the party of the first part has caused the seal of said company to be affixed hereto, and this deed to be subscribed by its president.

And the parties of the second part have hereto set their hands the day and year first above written.

JOHN CUBBINS,
President of Memphis Water Company.

Attest:
CHA'S J. PHILLIPS, *Sec. & Treas.*

F. S. DAVIS.
T. R. FARNSWORTH.
J. L. WORTH.

Witnesses to signature of James L. Worth—
J. B. NONES.
W'M K. KITCHEN.

UNITED STATES OF AMERICA,
State of New York, City & County of N. Y., ss.:

[SEAL.] By this public instrument, be it remembered that, on this twentieth day of February, A. D. one thousand eight hundred and seventy-two, before me the subscriber, Joseph B. Nones, a commissioner in and for the State of New York, appointed by the governor of the State of Tennessee, to take proof and acknowledgment of deeds, mortgages, letters of attorney, or any other instrument to be used or recorded in the State of Tennessee, and to administer oaths and affirmations, take depositions, etc., etc., personally appeared James L. Worth, the person described in and who executed the annexed instrument, and acknowledged to me that he executed the same voluntary and freely, for the uses and purposes therein stated, as his free act and deed.

And I further certify that I know the person who made the said acknowledgment to be the identical person described in, and who executed the said annexed instrument.

In testimony whereof I have hereunto subscribed my name and affixed my official seal, the year, month, and day first before written.

[SEAL.] J. B. NONES,
Commissioner of the State of Tennessee for the State of New York aforesaid, No. 91 Duane st., cor. Broadway.

STATE OF TENNESSEE, *County of Shelby:*

On this 24th day of February, 1872, before me personally came John Cubbins, the president of the Memphis Water Company, of the city of Memphis, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of Memphis; that he was the president of the Memphis Water Company; that he knew the corporate seal of said company; that the seal affixed to the within instrument was such corporate seal; that it was affixed by order of the board of directors of said company; and that he signed his name thereto by the like order, as president of said company.

JOHN CUBBINS, *President.*

Sworn to and subscribed before me, this 24th day of February, 1872.

[SEAL.] J. M. BOOKER,
Notary Public for Shelby County, Tennessee.

STATE OF TENNESSEE, *Shelby County:*

Personally appeared before me, James M. Booker, notary public, in and for said county, John Cubbins, president of the Memphis Water Company, F. S. Davis, and T. R. Farnsworth, the bargainors to the foregoing and hereto attached instrument of writing, with whom I am personally acquainted, and who acknowledged that they executed the same for the purposes therein contained.

Witness my hand and notarial seal, at office, this 24th day of February, A. D. 1872.

[SEAL.] J. M. BOOKER,
Notary Public in and for Shelby County, Tenn.

38 STATE OF TENNESSEE, *Shelby County:*

I, James Reilly, clerk of the county court of said county, do hereby certify that J. M. Booker, whose genuine signature appears to the hereto attached certificate of acknowledgment, is and was at the time of signing the same, a notary public duly commissioned and

qualified in and for said county, and that all his official acts as such are entitled to full faith and credit.

Witness my hand and seal of office at office this 26th day of February, A. D. 1872.

[SEAL.] JAMES REILLY, *Clerk.*

STATE OF TENNESSEE, *Shelby County*

The foregoing instrument, with clerk's certificate and United States revenue stamps to the amount of five cents, was filed in my office for registration, on the 26th day of February, 1872, at 1 o'clock p. m., and noted in note-book No. 7, page 117, and was recorded on the 29th day of February, 1872, in record-book No. 86, page 72 to 77.

JOHN BROWN, *Register.*

By J. C. BUSTED, *D. R.*

Fee, $3.25.

39 *The City of Memphis, her population, railroads, business, etc.*

The present population of Memphis is from 63,000 to 65,000, which, at present ratio of increase, will embrace 100,000 within six years. She is at the head of perpetual navigation of the Mississippi River, and is thus the great distributing point for the rich sections of West Tennessee, Arkansas, North Mississippi, and Alabama.

She has twenty-eight miles of streets and alleys, of which thirteen miles are paved—chiefly with the Nicholson; about ten miles of street railroad; also, nine thousand eight hundred private dwellings, forty-two churches, fourteen hotels, and thirty-eight manufacturing establishments.

Receipts of cotton last year were 516,000 bales, valued at, say $40,000,000, and ranking her third in importance among all the great cotton marts of the United States.

Her general business, aside from cotton, approximates $80,000,000 annually, and is steadily and satisfactorily increasing.

Her railroads, at present in successful operation, are the Memphis and Charleston, Memphis and Louisville, Mississippi and Tennessee, and Memphis and Little Rock, while the Memphis and Selma, Memphis and Paducah, and Memphis and Savannah are in rapid construction, and will soon be completed. These, with several other roads in contemplation—including the Memphis and Kansas City, Memphis and Vicksburg, Shreveport and Knoxville roads—clearly indicate that Memphis is destined to become one of the great railroad centres of the United States as well as a cardinal feature of the great southern route to the Pacific.

40 *Decree.—Feb'y 7th, 1873.*

In this cause upon the hearing of the application of the City of Memphis for an injunction, according to the prayer of its bill, against the sale of the shares of stock in the Memphis Water Company, advertised
41 by the marshal under the alias execution issued in favor of the said T. E. Brown against The City of Memphis, both parties being in court, by their solicitors, the injunction as prayed for is refused; but leave is hereby given the City of Memphis after the sale has been made to file an amended and supplemental bill with the proper allegations,

and making the purchaser of the said stock a party defendant in this cause, and praying the proper relief against him.

Amended bill.—Filed Feb'y 7, 1873.

Circuit court of the United States, district of West Tennessee.

To the judges, &c., sitting in equity:

By leave of the court first had, the plaintiff, by way of an amended and supplemental bill in this cause, respectfully states and shows, in addition to the matters set up in its original bill, all of which are hereby adopted and re-affirmed, (the same not being substantially recited by leave of the court and for brevity,) that, on the 7th day of February, 1873, the above cause, under the advertisement of sale, and a postponement thereof, mentioned in the original bill, the marshal offered and sold at public auction to the highest bidder the said one thousand
42 shares of stock in the Memphis Water Company; the defendant, T. E. Brown, being the highest bidder, became the purchaser thereof at and for the sum of three thousand dollars, which, as the plaintiff supposes, he will cause to be entered as a credit on the said execution, and will procure from the marshal a conveyance or transfer of the said shares of stock.

The plaintiff charges that the said sale, for the reasons stated in the original bill, is void and passed no title to the said stock; but, inasmuch as the said T. E. Brown, unless restrained by the order of the court, will dispose of or transfer the said stock and thereby place the same beyond the control of the court for the purposes of this suit, or otherwise produce unnecessary and grave complications, the plaintiff files this amended and supplemental bill.

In consideration of the premises the plaintiff prays that the said T. E. Brown, his agents and attorneys, by the order of the court here, may be enjoined and restrained from selling, transferring, or in any wise disposing of the said shares of stock in the Memphis Water Company, so purchased by him at the said sale, until the final determination of this suit; that, on the final hearing his purchase may be declared
43 void, and of no effect, and the said sale be cancelled, and the said shares of stock to be decreed to be the property of the plaintiff as the agent of and in trust for the public; and the plaintiff prays for all such other and proper relief as it may be entitled to, and for the relief prayed in its original bill; and as in duty bound, &c.

W. M. RANDOLPH,
City Attorney.

John Johnson, mayor of the city of Memphis, makes oath that the statements of the foregoing bill are true to the best of his knowledge, information, and belief.

[L. S. OF CITY.] JOHN JOHNSON, *Mayor.*

Subscribed and sworn to before me this 7th day of February, 1873.

JOHN F. FISCHER,
Public Notary.

Decree.—February 7th, 1873.

The City of Memphis having, by leave of the court, filed its amended and supplemental bill in this cause, moves the court for an in-

41 junction in accordance with the prayer of the same; and, upon consideration, it is ordered that the defendant, T. E. Brown, and his agents and attorneys, be, and they are hereby, enjoined and restrained from selling, transferring, disposing of, or any way encumbering the 1,000 shares of stock in the Memphis Water Company, this day purchased by the said T. E. Brown under the sale made by the marshal, as stated in the said amended and supplemental bill, or any part of the same, until the final determination of this cause in this court, or in the Supreme Court of the United States, should the same be taken there; and that he hold the same subject to the order of the court to abide the event of this suit, or until the further order of this court; and S. Sibley, esquire, the solicitor of record of said T. E. Brown, who is out of the jurisdiction of this court, being now in court and acknowledging service of this order, it is ordered that such service stand in place of and have the same effect as service upon the said T. E. Brown in person.

Demurrer.—Filed February 7, 1873.

The defendant demurs generally to the bill of complainant and supplemental bill, for that there is no equity in the bill, and prays judgment whether he shall further answer the same.

S. SIBLEY,
Sol' for Defendant.

45 *Decree—February 7th, 1873.*

This cause was this day heard upon the demurrer of the defendant to the bill and amended and supplemental bill of the plaintiff, and it appearing, *and it appearing* to the court that the bill and amended and supplemental bill have no equity, and that the demurrer is well taken, it is ordered that the same be allowed, and that the bill and amended and supplemental bill be dismissed, and that the defendant recover of the plaintiff the costs of the same, for which execution may issue; and thereupon the City of Memphis prays an appeal from the said decree so dismissing its bill and amended and supplemental bill to the next term of the Supreme Court of the United States, and the same is granted; and the appeal bond is fixed at two hundred and fifty dollars, which shall be given within the time prescribed by law, and the clerk will approve the security on the same.

Appeal bond.—Filed Febr'y 7, 1873.

Circuit court of the United States for the district of West Tennessee.

Know all men by these presents that we, the City of Memphis and John Johnson, are held and firmly bound unto T. E. Brown, in
46 the sum of two hundred and fifty dollars, to be paid to the said Brown, his executors and administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of ours heirs executors, and administrators, firmly by these presents, sealed with our seals and dated this 7th day day of February, A. D. 1873.

Whereas the above-named City of Memphis hath prosecuted an appeal to the Supreme Court of the United States to reverse a decree rendered in the circuit court of the United States for said district, in equity, in favor of said Brown and against said city: Now, therefore,

the condition of this obligation is such that if the above-named City of Memphis shall prosecute its said appeal to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

THE CITY OF MEMPHIS, [SEAL.]
By JOHN JOHNSON, *Mayor.*
JOHN JOHNSON. [SEAL.]

Signed, sealed, and delivered in presence of and approved by me this 7th day of February, 1873.

HORACE E. ANDREWS,
Clerk of said Circuit Court.

[L. S. OF CITY.] Attest:
L. R. RICHARDS, *City Register.*

47 *Bill of cost.*

Circuit court U. S. November term, 1872.

CITY OF MEMPHIS *versus* T. E. BROWN. } 196.

Judgment 7th day of February, 1873.

For debt	$
For damage	$
	$

CLERK'S FEES.

Bond for cost, 30c; filing do. 10c; certificate on do. 15c	55
Filing bill, 10c; certificate on do., 15c	25
Rule to plead, 15c; filing replication, 10c	25
Certificate on do. 15c; filing 4 other papers in cause, 10c each, 40	55
Administering 1 oath, 10c each	10
Order for judgment by default, 15c; final judgment, 15; order for costs, 15c	45
Judgment against security, 15c; order for execution, 15c	30
Issuing execution, $1.20; certificate on do. 15c; copying and filing costs, 40; certificate, 15c	1 90
Making dockets, indexes, &c., 3.00; enrolling cause, 5.00	8 00
2 other orders, 15c each	30
	12 65

MARSHAL'S FEES.

Executing summons, $2.00; executing subpœnas, 50c each; miles of traveling in serving process, 60c each....

ATTORNEY'S FEES.

Docket fee on depositions	
Docket fee in court	20 00
	$32 65

HORACE E. ANDREWS, *Clerk.*

48 THE UNITED STATES OF AMERICA,
Sixth Circuit and District of West Tennessee:

I, Horace E. Andrews, clerk of the circuit court of the United States for said district of West Tennessee, do hereby certify that the papers hereto attached are a full, true, perfect, and correct copy of the original record and proceedings as the same now appear of record and upon the files in the clerk's office of said court, in the within entitled cause, No. 196, equity docket.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office in the city of Memphis, this nineteenth day of May, A. D. 1873, and of the Independence of the United States the 97th year.

[SEAL.] HORACE E. ANDREWS, *Clerk.*

Fees, $23.00, p'd by city.

(Indorsement on cover:) No. 634. The City of Memphis, appellant, vs. Tallmadge E. Brown. W. Tennessee C. C. U. S. Filed 5th November, 1873.